

The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences

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THE EUROPEAN UNION AND THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A STORY OF EXCLUSIVE AND SHARED COMPETENCES

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ABSTRACT

The signature and conclusion of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) by the European Community (now European Union) marks a significant step forward in the protection of human rights by the EU. Whilst the EU has become a party to international treaties in the past, this is the first such accession to a human rights treaty. As a consequence, the conclusion of the CRPD by the EU raises many interesting questions, and the path to be followed by the EU in identifying which Convention obligations it is bound by, or should act on, and which obligations fall primarily within the responsibility of the Member States, is, as yet, untried. This article is a first attempt to examine some of those issues and, specifically, to reflect on what factors will determine whether EU action to implement the Convention would be appropriate in those many areas that fall within the shared competence of the EU and the Member States.

Keywords: competence; disability rights; European Union; mixed agreement; United Nations Convention on the Rights of Persons with Disabilities

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§1. INTRODUCTION

The European Union concluded the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in December 2010, with the Convention coming into force for the EU a month later, in January 2011. The European Community, represented by the Commission, had previously played an important role in the negotiation of the Convention, and the Community signed the Convention in 2007. The signature and conclusion of the CRPD marks a significant step forward in the protection of human rights by the EU. Whilst the EU has become a party to international treaties in the past, this is the first such accession to a human rights treaty. As a consequence, the conclusion of the CRPD by the EU raises many interesting questions, and the path to be followed by the EU in identifying which Convention obligations it is bound by, or should act on, and which obligations fall primarily within the responsibility of the Member States, is, as yet, untrod. This article is a first attempt to examine some of those issues.

Drawing on the Council Decision to conclude the Convention,¹ the article identifies areas that fall within the exclusive competence of the EU, where the EU is bound to comply in full with the Convention. The article also identifies the much wider range of fields that fall within the shared competence of the EU and the Member States. In particular, the article reflects on what factors will determine whether EU action to implement the Convention would be appropriate in these areas of shared competence.

The article begins by providing a brief overview of the general competence the EU has to address disability issues, particularly in the context of fundamental or human rights. The article proceeds with an introduction to the CRPD and a short discussion on its status as a mixed agreement under EU law. There follows an examination of the legal instruments which resulted in the EC/EU concluding the Convention, and a reflection on what those tell us about the EU's vision of its own commitments under the Convention, and its understanding of the competence it has to act. One area of shared competence, non-discrimination, is examined in detail, and the possible relevance of the CRPD for the adoption of EU legislation in this field is considered. Lastly, the article reflects on the factors that may influence the implementation of the Convention by the EU more generally, particularly in those areas of shared competence.

¹ Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities(2010/48/EC), [2010] OJ L 303/16.

§2. THE EU'S GENERAL COMPETENCE TO ADDRESS DISABILITY ISSUES

For most of the history of the EU,² the founding Treaties contained no explicit reference to disability, and therefore no disability-specific competence existed.³ Nevertheless, occasional references to disability, and disabled people, were found in a handful of legal instruments and soft law initiatives, although these did not amount to an attempt to develop a broad disability policy or programme until relatively recently. From a competence related perspective, the major breakthrough occurred with the Amsterdam Treaty, which came into force in 1999, and which included the first explicit mention of disability. The most significant reference occurred in the context of a general non-discrimination article, which is now found in Article 19 TFEU. This Article provides the EU with the competence to take action to combat discrimination on a number of enumerated grounds, including disability. Such action can be taken in all the fields in which the EU has competence. The Article has provided the legal basis for the Employment Equality Directive of 2000,⁴ which prohibits disability discrimination, as well as discrimination on the grounds of sexual orientation, age and religion or belief, with regard to employment, and for a 2008 proposal for a directive,⁵ which covers, *inter alia*, access to goods and services, and which again addresses disability amongst a number of other grounds.

The Lisbon Treaty, which came into force in 2009, introduced some further important changes with regard to disability. Article 10 TFEU contains a kind of mainstreaming provision, which provides that in 'defining and implementing its policies and activities, the Union shall aim to combat discrimination based on (...) disability'. The Lisbon Treaty also changed the status of the EU Charter of Fundamental Rights, which had first been adopted at Nice. Under Article 6(1) TEU, the Charter now has the same legal value as the Treaties, and the EU is obliged to comply with the Charter in all its activities, as are the Member States when they are implementing EU law. The Charter itself specifically addresses the rights of people with disabilities in a number of articles. Under Article 21, discrimination on any ground, including disability, shall be prohibited, whilst under Article 26, the Union recognizes and respects the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

² And its predecessors, the EC and EEC.

³ For a much more detailed examination of the evolution of the EC/EU's competences with regard to disability, and the development of the EC/EU's disability policy, see: L. Waddington, *From Rome to Nice in a Wheelchair, The Development of a European Disability Policy* (Europa Law Publishing, Groningen 2006).

⁴ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

⁵ European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM (2008) 425.

In addition to these disability-specific references in the Treaties and Charter, the EU has adopted a number of legal instruments that pay particular attention to the situation of people with disabilities. On occasions disability-specific references have been included in such instruments on a structural basis, and a mainstreaming approach has been pursued. This is largely the case with regard to instruments related to transport, where references to disability have been included in mainstream secondary legislation establishing, for example, technical standards applicable to transport modes and infrastructure,⁶ and general passenger rights.⁷ Rather than relying only on disability-specific measures, mainstreaming implies that disability-related needs be pursued in all activities. In contrast, one disability-specific instrument, a Regulation relating to the rights of air passengers with reduced mobility, has also been adopted.⁸ It is worth noting that all of these instruments have been adopted in the absence of any explicit reference to disability in the Treaty Chapter relating to transport. The Treaty has therefore explicitly given the EU the competence to legislate in the field of transport, and the EU has exercised this competence by, *inter alia*, including references to the needs of passengers with a disability, and disability accessibility, in some of the secondary legislation adopted under this Chapter.

In contrast, in some other areas, disability seems to have been addressed in a rather *ad hoc* and perhaps random manner. One example of such a field is the internal market, where occasional references to disability are found in instruments based on (what is now) Article 114 TFEU. For example, Directive 95/16/EC⁹ on lifts refers to the need to ensure accessibility for disabled persons; Directives 2004/17¹⁰ and 2004/18¹¹ on public procurement provide that, whenever possible, technical specifications relating to public

⁶ See, for example, Regulation (EC) No. 1899/2006 of the European Parliament and of the Council of 12 December 2006 amending Council Regulation (EEC) No. 3922/91 on the harmonization of technical requirements and administrative procedures in the field of civil aviation, [2006] OJ L 377/1; Directive 2006/87/EC of the European Parliament and of the Council of 12 December 2006 laying down technical requirements for inland waterway vessels and repealing Council Directive 82/714/EEC, [2006] OJ L 389/1; and Commission Regulation (EC) No. 8/2008 of 11 December 2007 amending Council Regulation (EEC) No. 3922/91 as regards common technical requirements and administrative procedures applicable to commercial transportation by aeroplane, [2008] OJ L 10/1.

⁷ See, for example, Regulation (EC) No. 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos. 1191/69 and 1107/70, [2007] OJ L 315/1 and Regulation (EC) No. 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations, [2007] OJ L 315/14.

⁸ Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, [2006] OJ L 204/1.

⁹ Directive 95/16/EC on the approximation of the laws of the Member States relating to lifts, [1995] OJ L 213/1 as amended.

¹⁰ Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, [2004] OJ L 134/1.

¹¹ Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] OJ L 134/114.

procurement contracts should take into account accessibility for disabled people and design for all requirements;¹² and Directive 2002/22¹³ on universal services and users' rights relating to electronic communication networks and services requires Member States to ensure that covered services are affordable for disabled users and that they have the same conditions of access as others. All of these instruments have, as their legal basis, Article 114 TFEU (ex 95 EC),¹⁴ and therefore recognize the disability dimension to securing the internal market. However, there are many other internal market provisions which would seem to offer the potential to mainstream disability issues, such as the General Product Safety Directive,¹⁵ but which fail to do so, and the inclusion of appropriate provisions relating to disability in internal market provisions does not seem (yet) to be an automatic process.

This brief overview reveals the potential the EU has to adopt legislation which specifically refers to people with disabilities, even in those areas in which the relevant legal base or treaty article does not include an explicit reference to disability. This is a potential which could be built on following the EU conclusion of CRPD, and enable the EU to adopt further instruments relating to disability to implement the Convention. The article now provides a brief overview of the CRPD, before turning to the discussion of the obligations imposed on the EU by the Convention.

§3. THE CRPD AND ITS STATUS AS A 'MIXED AGREEMENT' UNDER EU LAW

A. INTRODUCTION TO THE CRPD¹⁶

The Convention, as is appropriate for a human rights instrument, strongly reflects the social model of disability.¹⁷ Explicit recognition is made of the fact that 'disability

¹² In this context see: Build for All, Promoting Accessibility for All to the Built Environment & Public Infrastructure, Luxembourg, 2006. The Build For All Reference Manual aims to provide assistance for the inclusion of accessibility criteria in public calls for tenders under the Public Procurement Directive. See also www.build-for-all.net/ (last visited 10 November 2011).

¹³ Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), [2002] OJ L 108/51.

¹⁴ In the case of Directive 2004/17 and 2004/18 on public procurement, Articles 47(2) EC and 55 EC are also legal bases in addition to Article 95 EC.

¹⁵ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, [2002] OJ L 11/4.

¹⁶ This text is based on an extract from: L. Waddington, 'Breaking New Ground: The Implications of Ratification of the UN Convention on the Rights of Persons with Disabilities for the European Community', in O.M. Arnardóttir and G. Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Martinus Nijhoff Publishers, Leiden 2009), p. 111–140.

¹⁷ The social model of disability can be contrasted with the medical model of disability. The latter argues that a disability is a direct consequence of an impairment, and is the result of an incapacity caused

results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.¹⁸ The Convention therefore reflects the reality that disability stems primarily from the failure of the social environment to meet the needs and aspirations of people with impairments, and is the highest legal manifestation and confirmation of the social model of disability on the international stage.

Moreover, the scope of the Convention is extremely broad.¹⁹ The Convention does not simply prohibit disability discrimination, nor does it only cover civil or political rights, or economic, cultural or social rights. Instead the Convention is underpinned by the principles of non-discrimination and equality, which embrace the right to a reasonable accommodation, and these are linked to a broad group of rights. These rights are both civil and political, such as the right to liberty,²⁰ as well as more substantive, such as the right to education.²¹

The principles of equality and non-discrimination run through the Convention like a red thread. They find their anchor in Article 3, which Gerard Quinn has described as providing the 'moral compass for change'²² which the Convention embraces. This Article refers not only to non-discrimination and equality of opportunity, but a series of other principles which 'animate' the Convention, including dignity; individual autonomy; full and active participation and inclusion; respect for difference; and accessibility. The principles of non-discrimination and equality find repeated reference elsewhere in the Convention. In light of this, Article 2, which elaborates on key terms used in the Convention, contains a broad definition of 'discrimination on the basis of disability', and specifies that such discrimination includes the denial of a reasonable accommodation.

The principles of equality and non-discrimination also receive specific attention in Article 5. This Article embraces both a formal approach to equality ('equal before and under the law')²³; and a more substantive approach ('prohibit discrimination on the basis of disability';²⁴ provision of 'reasonable accommodation';²⁵ and positive

by an impairment. There is a wealth of literature addressing theoretical models of disability. See, e.g., M. Oliver, *Understanding Disability: From Theory to Practise* (Macmillan Press Ltd., Basingstoke 1996), and M. Priestley, 'Constructions and creations: idealism, materialism and disability theory', 13 *Disability and Society* 1 (1998), p. 75–94.

¹⁸ Preamble, recital (e) and Article 1.

¹⁹ G. Quinn, 'The UN Convention on the Human Rights of Persons with Disabilities', 10 June 2007, paper on file with author, p. 9, and T.J. Melish, 'Perspectives on the UN Convention on the Rights of Persons with Disabilities: The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify', 14 *Human Rights Brief* (2007), p. 37 at footnote 11, who describes the Convention as adopting a 'hybrid approach'.

²⁰ Article 14, which covers liberty and security of the person.

²¹ Article 24.

²² G. Quinn, 'The UN Convention on the Human Rights of Persons with Disabilities', paper, p. 3.

²³ Article 5(1).

²⁴ Article 5(2).

²⁵ Article 5(3).

action measures²⁶ ‘shall not be considered discrimination’). States Parties are under an obligation to recognize and ensure protection of these rights. Elsewhere the Convention is ‘sprinkled’ liberally with references to non-discrimination, equality and reasonable accommodation. Article 6, another transversal article addressing the particular needs of women with disabilities, specifies that States Parties recognize that women and girls with disabilities are subject to multiple discrimination. Eliminating discrimination, in the sense of removing obstacles and barriers to accessibility, lies at the heart of Article 9. Article 12, on equal recognition before the law, and Article 13, on access to justice, refer to the need to recognize that people with disabilities ‘enjoy legal capacity on an equal basis with others in all aspects of life’, and that they have ‘effective access to justice ... on an equal basis with others’ respectively.

Turning to the specific fields covered by the Convention, one finds a broad range of rights protected. The Convention covers classical rights, which include, in addition to those already mentioned, the right to life (Article 10); freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 15); freedom from exploitation, violence and abuse (Article 16); protecting the integrity of the person (Article 17); and respect for privacy (Article 22). The Convention recognizes that, in order to protect and respect some ‘classical’ rights, quite substantial action by States Parties is required. Whilst these ‘classical’ rights are certainly not irrelevant from the perspective of the European Union, they have traditionally fallen more within the scope of the Council of Europe, and under the European Convention of Human Rights, than been matters for regulation by EU law. For this reason, it is likely that the more substantive rights found in the text will be of particular importance for determining the implications of the Convention for the EU.

Other articles address living independently and being included in the community (Article 19); personal mobility (Article 20); education (Article 24); health (Article 25); employment (Article 27); adequate standard of living and social protection (Article 28); and participation in cultural life, recreation, leisure and sport (Article 30).

Article 33 relates to implementation and monitoring, and requires States Parties to designate a focal point for matters relating to the implementation of the Convention, and establish a framework, including one or more independent mechanisms, to promote, protect and monitor implementation. The attention paid to national implementation and monitoring is one of the more innovative elements of the Convention.

Finally,²⁷ Article 4 of the Convention sets out the general obligations of the States Parties, which include the requirement ‘to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present

²⁶ The Convention does not refer to positive action, but instead speaks of ‘Specific measures which are necessary to accelerate or achieve de facto equality’, Article 5(4).

²⁷ Given that the purpose of this paper is to not to explore the implications of the Convention in full, the description of its contents has necessarily been brief and selective. Many important provisions have not been touched on in this overview.

Convention'. Gerard Quinn has concisely stated that this article 'converts the convention into a trigger for worldwide disability law reform'.²⁸

B. THE CRPD AS A MIXED AGREEMENT UNDER EU LAW

Many of the international agreements that the EU enters into, including the CRPD, involve concurrent jurisdictions of both the Member States and the EU. Such 'mixed agreements' have been described as unique in international relations since they 'involve (...) a shared contractual relationship between an international organisation and its members and one or more third countries and/or international organisations'.²⁹

As may already be clear, in the context of the CRPD the full range of competences of both the EU and the Member States are engaged. Specifically, one of three, or possibly four, scenarios can describe the respective competence of the EU and its Member States with regard to individual provisions of the Convention. Namely, the EU has exclusive competence to act; the Member States have competence to act; the EU and the Member States share the competence to act; and lastly the EU can support and supplement the action of the Member States.

As will be seen below, the fields in which the EU has exclusive competence³⁰ are fairly limited, whilst a much broader set of fields fall within the areas of shared competence with the Member States. Where the EU's competence to act is not exclusive, including with regard to shared competences,³¹ the Member States remain free to act collectively, individually or jointly with the Union to fulfil the obligations under international agreements.³² In the context of the CRPD it is submitted that it is these fields of shared competence where uncertainty exists as to how to proceed, and at which level – EU or Member State – action should be taken. Should Member States, which have ratified

²⁸ G. Quinn, 'The UN Convention on the Human Rights of Persons with Disabilities', paper, p. 5.

²⁹ D. Verwey, *The European Community, the European Union and the International Law of Treaties: A Comparative Legal Analysis of the Community and Union's External Treaty-Making Practice* (T.M.C. Asser Press, The Hague 2004), p. 35.

³⁰ Article 3 TFEU provides that the Union shall have exclusive competence in the following areas: customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; and the common commercial policy (Art. 3(1) TFEU). In addition the Union has exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope (Art. 3(2) TFEU).

³¹ Article 4 TFEU provides that the Union shares competence with the Member States where the Treaties confer on it a competence which does not relate to Article 3 (exclusive competence) or Article 6 (competence to carry out actions to support, coordinate or supplement the actions of the Member States). Article 4(2) TFEU lists a number of areas where competences are shared, including the internal market, social policy as defined in the TFEU, and transport.

³² See *Re: European Development Fund*, Case C-316/91 *European Parliament v. Council* [1994] ECR I-625.

the Convention, proceed to implement the relevant CRPD provisions on an individual basis, or should the EU intervene and require, encourage, or support the development of EU-wide implementation provisions? This issue will be examined below, and attention will be paid to both the approach identified in the various EU instruments relating to the conclusion of the Convention by the EU, and a broader discussion embracing the principles of subsidiarity and proportionality. However, prior to engaging in such a reflection, the conclusion of the CRPD by the EU, and the legal instruments which allowed this to happen, will be considered. These are notable in that they pay specific attention to the competence of the EC/EU to act with regard to the CRPD, and to the fields in which the EU and Member States share competence.

§4. THE CONCLUSION OF THE CRPD BY THE EC/EU

The European Community, represented by the European Commission, played an active role in the negotiations that led to the Convention. Following the adoption of the CRPD in 2006, the European Community, along with all of its Member States, signed. The Council Decision³³ on the signing of the Convention by the Community has, as its legal basis both Articles 13 EC (now Article 19 TFEU) and 95 EC (now Article 114 TFEU).³⁴ The former article addresses combatting discrimination on the grounds of *inter alia* disability, whilst the latter covers the establishment and functioning of the internal market. Although Article 13 EC had been previously referred to in this context, being mentioned *inter alia* in both the 2003 Commission Communication ‘Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities’ and the Opinion of the Economic and Social Committee on the Communication,³⁵ this was the first explicit reference to the internal market provision in Community documents on the Convention. It seems that it was only recognized, at this relatively late stage, that the Convention could engage Community obligations in areas beyond non-discrimination.

Whilst the intention and commitment of the EC to conclude the Convention was clear, the timeline according to when this would happen was not. Although no official statement or decision was made, there was speculation that the Community would wait until all 27 Member States had ratified the Convention before following suit.³⁶ However,

³³ Council Decision (EC) on the signing, on behalf of the European Community, of the United Nations’ Convention on the Rights of Persons with Disabilities, 20 March 2007, 7407/07.

³⁴ A third legal basis was Article 300(2) EC. As was noted above, this Article addresses the procedure to be followed when the Community makes agreements with international organizations.

³⁵ Economic and Social Committee (EC), *Opinion on the Communication from the Commission Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities of 24 January 2003*, COM (2003) 16 final.

³⁶ See D. Ferri, ‘The Conclusion of the UN Convention on the Rights of Persons with Disabilities by the EC/EU: A Constitutional Perspective’, in L. Waddington and G. Quinn (eds.) *European Yearbook of Disability Law* (Volume 2, Intersentia, Antwerp 2010), p. 63.

this did not prove to be the case. In November 2009 the Council adopted a Decision concerning the conclusion, by the European Community, of the CRPD.³⁷ Whilst the Commission had initially proposed that this Decision have a significant number of legal bases (Articles 13, 26, 47(2), 55, 71(1), 80(2), 89, 93, 95 and 285 EC [now Articles 19, 31, 53, 62, 91(1), 100(2), 109, 113, 114 and 338 TFEU]),³⁸ the Council limited the substantive legal bases to Article 13 and 95 EC. Under the Decision, the Council approved the CRPD on behalf of the Community,³⁹ and authorized the President of the Council to deposit the instruments of formal confirmation of the Convention with the Secretary General of the United Nations.⁴⁰ However, this could only happen following the agreement of a Code of Conduct by the Council, Commission and the Member States. The Code was to determine ‘the appropriate arrangements for representation of the Community’s position at meetings of the bodies created by the UN Convention’ and ‘the arrangements for ensuring close cooperation’ between the Commission and the Member States, in particular with regard to ‘monitoring, reporting and voting arrangements’.⁴¹

The Decision also specified that, when depositing the instruments of formal confirmation, the President of the Council would deposit a Declaration of Competence. This was also foreseen in Article 44 of the CRPD, which concerns regional integration organizations, and which was inserted into the Convention specifically to allow the EC/EU to accede thereto. Article 44 CRPD provides that regional integration organizations, meaning a regional organization to which its Member States have transferred competence in respect of matters governed by the Convention, can become a party to the Convention. When doing so, such organizations are required to declare the extent of their competences with regard to the fields covered by the Convention, and they are only bound by the Convention within the limits of their competence. The Council Decision contains, in Annex II, the necessary Declaration of Competence. This Declaration is considered further below.

The aforementioned Code of Conduct⁴² was adopted in November 2010. As noted above, the Code of Conduct is an agreement between the Council, the Member States and the Commission that sets out the internal arrangements for the implementation by, and representation of, the EU relating to the CRPD. The Code addresses a number of issues, including the division of tasks based on competence; establishing of positions; speaking in cases of agreed coordinated, Union or common positions; speaking and voting in

³⁷ Council Decision 2010/48/EC, [2010] OJ L 303/16.

³⁸ In conjunction with the procedural legal bases of Articles 300(2) and 300(3) EC (now Articles 218(1) and 218(2) TFEU).

³⁹ Article 1(1).

⁴⁰ Article 2(1).

⁴¹ Article 4(2) and 4(3).

⁴² Council Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the European Union relating to the United Nations Convention on the Rights of Persons with Disabilities (2010/C 340/08), [2010] OJ C 340/11.

cases of no coordinated, Union or common positions; nominations; the focal point (as required by Article 33(1) CRPD); monitoring and reporting; and review of arrangements. Four articles in the Code address the division of tasks based on competence. These cover matters falling within the competence of the Member States, matters falling within the exclusive competence of the Union, matters falling within shared competence, and matters where the Union coordinates, supports and/or supplements the actions of the Member States. The specified procedures, and the Declaration of Competence attached to the Decision to Conclude the Convention, are examined in more detail below.

§5. THE EU'S COMPETENCES WITH REGARD TO MATTERS GOVERNED BY THE CRPD

The starting point for gaining an understanding of the competence of the EU with regard to the CRPD, and the implications thereof for coordination and cooperation with those Member States that have also ratified the Convention, are the aforementioned Council Decision to conclude the Convention and the related Code of Conduct.⁴³ Specifically, an annex is attached to the Council Decision, entitled 'Declaration concerning the Competence of the European Community with regard to matters governed by the United Nations Convention and the Rights of Persons with Disabilities', and the Code of Conduct addresses the Division of Tasks between the Union institutions and the Member States based on competence. Such Declarations of Competence are relatively common in international agreements that allow for participation by regional integration organizations alongside their Member States, and are intended to indicate to third countries the distribution of competence.⁴⁴

The Declaration of Competence 'indicates' the competences transferred to the Community (now Union) by the Member States in the areas covered by the Convention under the previous EC Treaty. Whilst the Declaration notes that the 'scope and exercise of Community competence are, by their nature, subject to continuous development', and that the Community will 'complete or amend this Declaration', no such amendments have been prepared in light of the coming into force of the Lisbon Treaty. The Declaration notes the existence of exclusive and shared competence, and states: '[t]he Member States remain competent for all matters in respect of which no competence has been transferred to the European Community'.

The Declaration proceeds to identify those areas of exclusive and shared competence. These are examined further below. However, it is worth noting that the Declaration was drawn up by the EU itself, and was not subject to external review or control. This means

⁴³ As well as the more general Articles 3, 4 and 6 TFEU, which were mentioned above.

⁴⁴ M. Cremona, 'External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and the Effects of International Law', *European University Institute Working Papers*, Law No. 2006/22 (2006), p. 21.

that it represents the Commission's subjective view of the relevant competences, and is not an objective or independent view prepared by an external body.

A. AREAS IN WHICH THE EC/EU HAS EXCLUSIVE COMPETENCE ACCORDING TO THE DECLARATION OF COMPETENCES

The Declaration⁴⁵ identifies three specific areas of exclusive competence of the EC/EU.⁴⁶ These are the compatibility of State aid with the common market, the Common Customs Tariff, and obligations with respect to the EC/EU's own public administration, including recruitment and conditions of service of staff. According to the Code of Conduct, in areas falling within the Union's exclusive competence, the Union will aim at elaborating Union positions.⁴⁷ This will occur through coordination meetings of the Commission and the Member States within the competent Council Working Group. Union positions will then be expressed by the Commission.⁴⁸

B. AREAS IN WHICH THE EU SHARES COMPETENCES WITH THE MEMBERS STATES ACCORDING TO THE DECLARATION OF COMPETENCES

The Declaration contains a much longer list of areas where the EU shares competence with the Member States: combatting discrimination on the grounds of disability; free movement of goods, persons, services and capital; agriculture; transport; taxation; internal market; equal pay for men and women; trans-European network policy; and statistics.

According to the Code of Conduct, for matters falling within shared competence and for matters where the Union coordinates, supports and/or supplements the actions of the Member States, both the Union and the Member States will aim at elaborating common positions through the aforementioned coordination meetings. However, in this case, the Commission and the Member States will decide who will deliver any statement to be made on behalf of the Union and its Member States. The common positions will be presented by the Commission, when the preponderance of the matter concerned lies within the competence of the Union, and by the Presidency or a Member State, when the preponderance of the matter concerned lies within the competence of the Member States.⁴⁹

⁴⁵ As noted, the Declaration refers to European Community, and not the European Union, as it was adopted prior to the coming into force of the Lisbon Treaty. In contrast, the Code of Conduct, refers to the European Union.

⁴⁶ In Article 1.

⁴⁷ Article 4.

⁴⁸ Article 6(b).

⁴⁹ Article 6(c).

C. AREAS OF COORDINATING, SUPPORTING AND/OR SUPPLEMENTING COMPETENCES ACCORDING TO THE DECLARATION OF COMPETENCES

Lastly, the Declaration notes that certain EU policies may be relevant to the CRPD. These relate to the development of a coordinated strategy for employment; the development of quality education; a Community vocational training policy; actions strengthening economic and social cohesion; and cooperation with third countries. These areas all concern EU action which coordinates, supports or supplements the action of the Member States. Common positions are developed and presented for these areas in the same way as for matters which fall under shared competences.

D. EC LEGAL INSTRUMENTS WHICH ILLUSTRATE THE COMPETENCE OF THE EC/EU IN MATTERS GOVERNED BY THE CONVENTION ACCORDING TO THE DECLARATION OF COMPETENCES

The Declaration of Competences includes an appendix listing 'Community Acts which refer to matters governed by the Convention'. The list of acts, all of which are legislative instruments, 'illustrate the extent of the area of competence of the Community' under the previous Treaty. The appendix further specifies that '[t]he extent of the Community's competence ensuing from these acts must be assessed by reference to the precise provisions of each measure, and in particular, the extent to which these provisions establish common rules that are affected by the provisions of the Convention.' However, the reader must decide for him or herself what these instruments reveal about the extent of the Community competence, since no further commentary or insight is given. Moreover, no attempt is made to identify which instruments establish the all-important common rules, which trigger EU exclusive competence. This is discussed further below.

Unlike the main Declaration of Competences, which uses headings familiar from the EC Treaty in identifying exclusive, shared and supporting competences, the list of acts found in the appendix adopts headings from the CRPD. In this context, six fields are identified: Accessibility (17 relevant EC instruments); independent living and social inclusion, work and employment (9 instruments); personal mobility (9 instruments); access to information (5 instruments); statistics and data collection (5 instruments); and international cooperation (3 instruments). As a consequence, for example, the heading 'independent living and social inclusion, work and employment', includes both instruments which relate to the exclusive competence of the EU (e.g. compatibility of certain categories of state aid with the common market), and instruments which reflect the shared competence of the EU and the Member States (e.g. the aforementioned Employment Equality Directive).

All the instruments listed make some reference to disability. In that sense they are almost all examples of mainstream instruments in which one or more references to disability, or disabled people, has been included, generally with the aim of ensuring that this group is better able to benefit from the measure in question. However, it is notable that a separate (and independent) review of EC legislation that included an explicit reference to disability identified just over 100 instruments,⁵⁰ rather than the 48 instruments listed in the EC Declaration of Competence. This review was published some six months before the Council Decision was adopted. Some of the instruments included in the independent review commissioned by the Academic Network of European Disability experts (ANED) relate to actions or initiatives of limited duration, such as the Decision establishing the European Year of Disabled Persons,⁵¹ and were not included in the Commission's illustrative list. It is also possible that other instruments identified in the ANED review cover fields that lie outside the scope of the CRPD, and were therefore not included in the Declaration of Competences, although this seems unlikely given the broad reach of the Convention. There remains nevertheless some discrepancy, in number at least, between the 102 instruments identified in the ANED review of June 2009, and the 48 instruments that are listed as illustrating the extent of the Community's competence in the Declaration. A closer inspection may reveal that some instruments, which do provide evidence of the EU's competence in the context of the CRPD, were left off this list by the Commission.

Second, since inclusion in the illustrative list seemed to require that the measure in question included a specific reference to disability, instruments which illustrate the Community's competence to act in a certain area, but which have not included a reference to disability, were not included. In the case of some of these instruments the Community arguably could have specifically addressed the situation of people with disabilities in the legislation. Indeed, the aforementioned ANED review revealed that EU legislation which made a reference to disability was particularly scarce in the field of, for example, consumer protection, although this is an area in which a disability-specific dimension would seem to arise. However, the EC Treaty arguably allowed for addressing the needs of people with disabilities in this area, and others, as does the current Treaty. Moreover, the wide range of instruments which do refer to disability, almost all of which

⁵⁰ Annotated review of European legislation which makes a reference to disability, prepared for the Academic Network of European Disability experts (ANED), June 2009. This review identified 102 legal instruments, of which 98 were regulations, directives or decisions. In December 2009 a second Annotated review of European legislation which makes a reference to disability, was published. This second version also covered significant relevant soft law documents, and therefore included a much larger number of instruments. The Declaration of Competences naturally does not refer to any soft law documents. Both reviews can be found via the ANED homepage at: www.disability-europe.net (last visited 10 November 2011).

⁵¹ Council Decision 2001/903/EC of 3 December 2001 on the European Year of People with Disabilities, 2003, [2001] OJ L 335/15.

were based on Treaty articles which included no specific reference to disability, reveal the great scope for mainstreaming disability within EC and now EU legislation.

The failure to include instruments in the Declaration, which are silent on disability, may serve to perpetuate a vicious circle. Where the EC/EU legislator is already open to including disability within mainstream legislation, as is the case with regard to transport legislation for example, the existing instruments already demonstrate that the EC and now the EU has competence in this area. However, where the legislator has not been open to the inclusion of disability in mainstream legislation in the past, no instruments exist to demonstrate the competence, although there is no legal reason, based on an interpretation of the Treaties, to support the claim that no competence exists. Therefore a past failure to address disability in a field may lead both to the perception of the legislator, and the 'claim' that the EC/EU has no disability-related competence in that field today, and to no incentive, in terms of CRPD obligations, to address disability issues in that field in the future.

E. THE DISTINCTION BETWEEN 'COMMON RULES' AND 'MINIMUM STANDARDS' IN THE CONTEXT OF FIELDS THAT FALL UNDER SHARED COMPETENCES

The Declaration specifies that, in some of 'those matters' that were initially presented as falling within the scope of shared competences, the EU in fact has exclusive competence. This is 'to the extent that provisions of the Convention or legal instruments adopted in implementation thereof affect common rules previously established by the European Community'.⁵² In contrast, '[w]hen Community rules exist but are not affected, in particular cases of Community provisions establishing only minimum standards, the Member States have competence, without prejudice to the competence of the European Community to act in this field.' In brief then, the EU in fact has exclusive competence where the Convention affects existing – or presumably new – EU provisions that establish 'common rules', from which the Member States cannot deviate. In such fields internal EU action has 'occupied the whole field', and has pre-empted Member States from acting in that field.⁵³ As a consequence, the EU has taken on full responsibility for ensuring compliance with the CRPD both by itself and its Member States. However, where EU legislation only sets 'minimum standards', thereby leaving Member States free to set higher standards or levels of protection where this is needed to comply with CRPD, the

⁵² See also Article 3(2) TFEU which specifies that the Union has exclusive competence for the conclusion of an international agreement, *inter alia*, 'in so far as its conclusion may affect common rules or alter their scope'.

⁵³ See M. Cremona, 'External relations and External Competence of the European Union', in P. Craig and G. de Búrca, *The Evolution of EU Law* (Second Edition, Oxford University Press, Oxford 2011), and particularly p. 244–253. The text in inverted commas is based on a phrase on p. 247 of Cremona's chapter.

Member States retain competence. The EU can nevertheless set common rules, also in these areas, in the future, if the Treaty allows for this. Where no relevant EU instrument exists, the competence rests with the Member States.

The implication of this statement almost seems to be that, in all areas where the EU does not have exclusive competence, including those where the EU has only set minimum standards, responsibility for complying with CRPD lies with the Member States which have ratified it, and the EU need pay little attention, if any, to the CRPD when setting minimum standards or taking any other action which falls outside its exclusive competence. Whilst, strictly speaking, this may be the correct interpretation of the Council Decision, it is submitted that, in practice, this is unlikely to reflect the approach of the EU and its institutions. Instead, when the EU sets minimum standards in fields falling within the scope of the Convention, as well as when it adopts all kinds of other relevant legislative and soft-law instruments, it will take account of the provisions and obligations imposed on State Parties by the CRPD in general.⁵⁴ In fact, it has already been recognized that the adoption of EU legislation in areas where the EU and the Member States share competence, and which only involves setting minimum standards, can be an effective way of ensuring compliance with CRPD by the Member States, as well as contributing to the EU's own goals, such as achieving the internal market. The following section examines this in more detail, and includes a case study of an area that falls within the shared competence of the EU and the Member States, where the CRPD has clearly influenced the Commission's (legislative) proposals.

§6. A CASE STUDY IN AN AREA OF SHARED COMPETENCE: NON-DISCRIMINATION

Combatting disability discrimination is a field which receives a lot of attention in the CRPD. It has already been noted that discrimination and equality are prominent themes in the Convention. Article 2 of the Convention, which elaborates on key terms used in the text, defines 'discrimination on the basis of disability' very broadly to mean:

⁵⁴ For a clear example of this approach, see the European Disability Strategy 2010–2020, which provides 'The overall aim of this Strategy is to empower people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society and in the European economy, notably through the Single market. Achieving this and ensuring effective implementation of the UN Convention across the EU calls for consistency. This Strategy identifies actions at EU level to supplement national ones, and it determines the mechanisms needed to implement the UN Convention at EU level, including inside the EU institutions. It also identifies the support needed for funding, research, awareness-raising, statistics and data collection.' Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, COM (2010) 636 final.

any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in political, economic, social, cultural, civil or any other field.

According to the Convention, such discrimination includes the denial of a reasonable accommodation. Under Article 4, which establishes general obligations, States Parties are to, *inter alia*, ‘take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise’⁵⁵ and under Article 5 they are to promote equality and eliminate discrimination and ‘take all appropriate steps to ensure that reasonable accommodation is provided.’⁵⁶

The Declaration of Competences clearly identifies combatting discrimination on the grounds of disability as an area of shared competence. Moreover, as noted, Article 13 EC (now Article 19 TFEU) provided the legal basis for the Council Decision to conclude the Convention. In addition, amongst the list of instruments which is attached to the Declaration, and which illustrate the competences of the EC, is the Employment Equality Directive of 2000. This prohibits discrimination with regard to employment and vocational training on a number of grounds, including disability, and requires that employers be obliged to make a reasonable accommodation in favour of disabled individuals. In 2008 the Commission proposed a new non-discrimination directive, which seeks to prohibit discrimination in areas beyond employment, such as access to goods and services, healthcare, education, social security, and which also covers a number of grounds, including disability. The proposal also seeks to establish a duty to provide for a reasonable accommodation in favour of disabled individuals beyond the field of employment.⁵⁷

Given that the EU has subsequently concluded the Convention, and the Convention imposes obligations on States Parties with regard to addressing disability discrimination, what is the status of this 2008 proposal under the Convention? Since the Convention clearly prohibits discrimination on the grounds of disability, and covers a very wide area, does that mean that the EU will be obliged to adopt at least a disability-specific non-discrimination directive extending beyond employment? What is the relevance of the fact that combatting discrimination is a competence shared with Member States? And does it matter that the Commission proposal only aims to set minimum standards, and not common rules?

In light of the fact that this is an area of shared competences, it does not seem possible to argue that there is a legal obligation on the EU under the Convention to

⁵⁵ Article 4(1)(e).

⁵⁶ Article 5(3).

⁵⁷ For a discussion of the impact which the CRPD has had on this proposal, see L. Waddington, ‘Future Prospects for EU Equality Law. Lessons to be Learnt from the Proposed Equal Treatment Directive’, 36 *European Law Review* 2 (2011), p. 163–184.

adopt a new directive addressing discrimination on the ground of disability, and going beyond employment. In a field in which competences are shared, strictly speaking it is the Member States that have the responsibility to comply with the Convention, as long as the EU has not acted. Any EU action that is taken must be in compliance with the Convention, but there does not seem to be a legal obligation under international law to act in fields of shared competence.

However, it can nevertheless be highly desirable for the EU to act in such areas of shared competence. Indeed, this is recognized by the Commission in the case of the proposed directive. In its staff working paper⁵⁸ accompanying the proposed Directive, the Commission wrote:

It should also be recalled that the UN Convention on the Rights of Persons with Disabilities will need in any event to be concluded and implemented by the EC and the Member States. Although there is no obligation to use EC-level legislation to implement the rights and obligations arising from the UN Convention, this would be a logical step, (...) Through transposing an EC directive prohibiting disability (*sic*) the Member States would implement those parts of the Convention which are included in the directive, such as the prohibition of discrimination in access to goods and services, health care, education, as well as the obligation to provide reasonable accommodation. Such partial implementation of the UN Convention by EC legislation could help to mitigate the risk of divergent national implementation measures.

Whilst not explicitly stated, the last sentence, referring to (unspecified) risks of divergent national CRPD implementation measures in the field of non-discrimination, clearly hints at the subsidiarity principle. According to this principle the Union should only take action if the objectives of the action could not be sufficiently achieved by the Member States and the Union can better achieve the action, because of its scale or effects.⁵⁹ In line with the subsidiarity principle, EU level action in some CRPD fields in which the EU and the Member States share competences may be appropriate, both politically and from the perspective of efficiency – but it is doubtful that there is any obligation on the EU under international law to act in a field in which it shares competence with the Member States.⁶⁰

⁵⁸ Commission staff working document accompanying the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, Impact Assessment, SEC (2008) 426 final.

⁵⁹ Art. 5(3) TFEU.

⁶⁰ In fact, for reasons which are not related to disability or the CRPD, it is highly unlikely that the EU will adopt this Directive, and negotiations are now stalled. See L. Waddington, 36 *European Law Review* 2 (2011), p. 163–184.

§7. THE IMPLEMENTATION OF THE CRPD BY THE EU: FINDING A WAY FORWARD IN AREAS OF EXCLUSIVE AND SHARED COMPETENCE

Following the conclusion of the CRPD, there is no doubt that the EU, in combination with the ratifying Member States, is fully bound by the Convention and obliged to comply with all elements thereof. This obligation falls in its entirety on the EU with regard to those fields where it has exclusive competence. As noted above, this includes the compatibility of State aid with the common market, the Common Customs Tariff and the public administration of the EU. However, such an obligation also exists with regard to other areas, to the extent that EU provisions establish common rules (as opposed to minimum standards). Whilst clearly providing for this, the Declaration of Competence does not specify which of the listed EU provisions establish such common rules. As a consequence it is not stated which EU instruments illustrate areas falling within the exclusive competence of the EU with regard to CRPD and therefore need to be checked to ensure full Convention compliance. It is suggested that, as a first step towards delimitating the EU's responsibilities in light of the CRPD, it is important to identify those EU instruments that establish such common rules. This would provide a fuller overview of the instruments and fields in which the EU has exclusive competences with regard to the Convention. Whilst such an examination is beyond the scope of this article, it is suggested that a number of the instruments which have been adopted with regard to transport, and which establish common standards for the interoperability of the rail system, including provisions addressing disability accessibility, as well as a Council Regulation relating to the rights of air passengers with a reduced mobility,⁶¹ do establish common rules, and therefore meet the requirements needed for those specific fields to move into the exclusive competence of the EU.

Nevertheless, the majority of fields in which the EU is active concern shared competences. Adopting a minimalist interpretation of the EU's obligations, one could argue that EU action must not breach the Convention in these fields – however, it need not also result in full compliance, since the Member States will also be bound by the Convention, and will remain free to meet their obligations under the Convention. The only requirement therefore is that EU law does not impose restrictions in this respect. Such an interpretation arguably would be supported by Heliskoski who, according to Cremona, argues that the Community (now Union) 'is only engaged [in international agreements LW] to the extent of its exclusive competence',⁶² with all other matters reserved to the Member States.⁶³ Such an approach to implementing the Convention

⁶¹ See footnotes 6–8 above.

⁶² M. Cremona, *European University Institute Working Papers*, Law No. 2006/22 (2006), p. 17.

⁶³ Heliskoski argues '(...) the justification for the participation of the Member States is to be found precisely in the circumstances that the Community has not decided – and upon the conclusion of a

would also reflect that ‘the European Union (...) has traditionally rooted its human rights obligations within its own legal order’⁶⁴ and would involve, for the most part, only ‘negative’ protection.

In contrast, Ahmed and de Jesús Butler, writing before the EU concluded the CRPD, have sought to argue that the EU’s human rights obligations can be grounded in international law, and could even flow from direct treaty obligations. Amongst the arguments they raise, is that the EU is subject to customary international law, including *ius cogens*; that EU Member States can be held accountable for breaches of international treaties to which they have acceded, even where the breach results from any acts or omission required by EU law; as well as considering the legal consequences for EU Member States of their pre-existing and new obligations to third states. However, Ahmed and de Jesús Butler do not directly seek to challenge the position that seems to be reflected in the EU instruments providing for the conclusion for the CRPD by the EU. In short, those instruments strongly suggest that the EU’s official stand point is that the organization is not under a legal obligation under international law to fully implement the Convention in those areas of shared competence. Taking this position as a starting point, this article now proceeds to consider what (pragmatic) reasons exist which could argue in favour of EU action in these areas of shared competence.

Firstly, concerted action by the EU to implement the Convention can simply be the most efficient way of complying with obligations imposed by the CRPD for the Member States, and be in line with the principles of subsidiarity and proportionality. As noted, the Commission has already (implicitly) made this argument with regard to the proposed Equal Treatment Directive. This argument seems to be based on a number of (positive and negative) claims. On the one hand, concerted EU action will remove the need for each individual Member States to develop specific national instruments. The Commission would take the lead in preparing any instrument or policy, but Member States would be fully involved through the usual EU (legislative) procedures. Moreover, with the exception of regulations, EU instruments leave ample room for taking account of national situations at the transposition or implementation stage. This approach would therefore respect the competences of the Member States, but arguably also provide for an efficient and concerted means of implementing the Convention.

Moreover, implementation of the Convention by the individual Member States also brings risks with it. In such a situation one can expect each Member State to adopt

given agreement does not decide – *actually to exercise* its non-exclusive competence, which makes it possible for the Member States to act under their own powers. But this must however mean that the Community’s participation is legally only relevant insofar as the Community’s exclusive competence is concerned; the rest of the commitments are assumed by the Member States in their individual capacity.’ J. Heliskoski, *Mixed Agreements*, emphasis in original, at p. 46–47, quoted in M. Cremona, *European University Institute Working Papers*, Law No. 2006/22 (2006), p. 17.

⁶⁴ T. Ahmed and I. de Jesús Butler, ‘The European Union and Human Rights: An International Law Perspective’, 17 *The European Journal of International Law* 4 (2006), p. 771.

differing national initiatives that, whilst meeting at least the minimum requirements of the CRPD, will create a diverse set of standards and level of protection throughout the EU. This could itself lead to problems, including potential barriers to the internal market. Such barriers could, for example, result from differing national requirements relating to disability accessibility standards that hamper the free movement of goods and services. Indeed, this very concern seems to be at least partially behind the Commission's ongoing consideration of the need for and desirability of a 'European Accessibility Act'.⁶⁵ In the most extreme situation, following the development of individual Member State approaches, the EU will find it necessary to intervene to establish common rules. However, where Member States have already adopted their own set of standards and legislation, their desire for EU action will decline, as they will have already complied with the Convention, whilst the potential barriers to such action, in terms of difficulties in gaining consensus, will increase. In that situation, Member States will have a vested interest in not agreeing to new legislation which will require them to amend their existing national law, and, if EU legislation is to be adopted, they may wish to see their different, and incompatible, national approaches transposed to the EU level, thereby rendering agreement more difficult. Concerted EU action, which is taken sooner rather than later, can help to prevent the development of such divergent approaches, and contribute to both the full implementation of the Convention and specific Treaty-related goals, such as the achievement of the EU internal market. This view of the desirability, or appropriateness, of EU intervention is also reflected, to some extent, in Cremona's argument that, with regard to internal obligations flowing from a mixed agreement, 'the essential issue is not the exercise of competence, but rather the scope of Community law and the preservation of the autonomy of the Community legal order'.⁶⁶ In short, a concerted approach to implementing the Convention can help to guarantee key EU rights and principles, including the rights of free movement, and help to prevent the establishment of potential barriers to achieving such rights in the future. In that sense, EU action would comply with the key requirements of proportionality and subsidiarity.

A last relevant point is that the Code of Conduct itself explicitly recognizes the relevance of the principle of subsidiarity with regard to the implementation of the CRPD by the EU and the Member States in areas of shared competence. Article 2 provides:

The Union institutions and the Member States will ensure close cooperation in the implementation of the Convention, bearing in mind the principles of sincere cooperation, subsidiarity and the need to respect the different competences of the Union institutions and the Member States as established by the Treaties, and bearing in mind that the scope and exercise of the Union's competences are, by their nature, subject to continuous development.

⁶⁵ European Disability Strategy, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe, COM(2010) 636 final, p. 5.

⁶⁶ M. Cremona, *European University Institute Working Papers*, Law No. 2006/22 (2006), p. 21.

Finally, a number of other points seem relevant for determining the path that future EU disability law and policy will take, in light of the EU's conclusion of the CRPD.⁶⁷ One could argue in the past that the EU disability policy was primarily an element of social policy – and for a long time the Disability Unit was included within DG Employment, Social Affairs and Inclusion. However, with the conclusion of the CRPD by the EU, one can now state that EU disability policy must be seen from the perspective of a human rights policy. This is reinforced by the enhanced legal status of the Charter of Fundamental Rights, and also seems to be reflected in the recent move of the Disability Unit to the newly created DG Justice.

Second, the EU, is under an obligation to set up various structures to promote, protect and monitor the implementation of the CRPD under Article 33, as are other States Parties.⁶⁸ The actual setting up of these structures and frameworks could, and should, impact on the approach to, and nature of, disability policy. This should not be a *pro forma* action – but lead to real changes within the EU – both in terms of the mentality within the EU, but also in other areas, such as cooperation with Member States and involvement of Disabled Peoples' Organizations.

§8. CONCLUSION

The conclusion of a human rights treaty by the EU raises many interesting questions, and takes the EU and its Member States into uncharted territory. Whilst the relevant EU instruments, and specifically the Council Decision to conclude the Convention, do distinguish between areas of competence exclusive to the EU and areas of competence which are shared with the Member States, many issues are left unresolved. Whilst we know that EU instruments which establish 'common rules' in areas falling under the scope of the Convention are within the exclusive competence of the EU, there has been no official designation of which instruments fall into this category. Moreover, the EU and the Member States are still finding their way with regard to the action to be taken in the many areas which fall within their shared competence. Nevertheless, the rather conservative legal interpretation of the obligations of the EU following conclusion of the UN CRPD which are reflected in the Council Decision seem to be somewhat misplaced. The Council Decision arguably only reflects a belief in 'negative' duty of the EU to comply with the Convention in the areas of shared competence, meaning only that the EU should

⁶⁷ See further A. Hoefmans, 'The EU disability framework under construction: new perspectives through fundamental rights policy and EU accession to the CRPD', in L. Waddington and G. Quinn (eds.), *European Yearbook of Disability Law* (Volume 3, Intersentia, Antwerp forthcoming).

⁶⁸ For further commentary, see L. Waddington, 'Reflections on the Establishment of a Framework to Promote, Protect and Monitor Implementation of the UN Convention on the Rights of Persons with Disabilities (Article 33(2) CRPD) by the European Union', *Maastricht Faculty of Law Working Papers* No. 2011/3 (2011), www.maastrichtuniversity.nl/web/institutes/metro/research/maastrichtworkingpapers1.htm (last visited 10 November 2011).

do nothing which hampers compliance with the Convention by its own Member States. However, it is submitted that the dynamic of the Convention, the requirement to set up structures to promote, protect and monitor the implementation of the Convention, and the desirability, from the point of view of EU law and EU cohesion, to find coordinated responses to the obligations imposed by the Convention on the EU and Member States in combination, all argue in favour of a far more active approach to implementation of the Convention by the EU.